Supreme Court, U.S.
FILED
MAY 2 1997
OFFICE OF THE CLERK

No. 96-1628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; LOUISE P. MATTEONI; JORGE L. BATISTA; EDWARD J. MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN; SAUL B. COHEN; JAMES C. DAWSON; ROBERT M. BENNET;

(Caption Continued on Inside Front Cover)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

YONKERS BRANCH NAACP'S OPPOSITION TO STATE OF NEW YORK'S PETITION FOR WRIT OF CERTIORARI

DENNIS COURTLAND HAYES
Counsel of Record
General Counsel
NAACP Special
Contribution Fund
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(301) 358-8900

MICHAEL H. SUSSMAN
STEPHEN BERGSTEIN

SUSSMAN, BERGSTEIN
& WOTORSON
25 Main Street
Goshen, New York 10924
(914) 294-3991

Attorneys for Respondent Yonkers Branch NAACP

23 pp

ROBERT M. JOHNSON; PETER M. PREYOR; ANTHONY S. BOTTAR; MERRYL H. TISCH; HAROLD O. LEVY; and ENA L. FARLEY, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; and CHARLES GARGANO, as Director of the Urban Development Corporation,

Petitioners,

vs.

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, minor by her mother, and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly-situated and the CITY OF YONKERS,

Respondents.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly interpreted the Equal Protection Clause and 42 U.S.C. section 1983 to hold petitioners liable for school segregation in the City of Yonkers where the district court held as a matter of fact that their failure to take remedial action, together with actions designed to cut back on school desegregation, were in response to pressures by State officials and constituents who opposed desegregation on grounds that were known to be race-based?

2. Whether the Court of Appeals improperly intruded on State authority by citing State law to hold that petitioners were required to ensure that school districts comply with the law and act to combat school segregation?

3. Whether the Court of Appeals violated principles of federalism and comity by imposing section 1983 liability against petitioners for maintaining school segregation in the City of Yonkers in response to local and state-wide opposition to desegregation?

RULE 29.6 STATEMENT

In accordance with Sup. Ct. R. 29.6, respondent NAACP states that it does not have a corporate parent, subsidiary, or affiliate.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	2
A. Respondents' statement of facts	2
B. The Court of Appeals' opinion	5
REASONS FOR DENYING THE PETITION FOR CERTIORARI	6
POINT I: THE COURT OF APPEALS FAITHFULLY APPLIED SUPREME COURT AUTHORITY AND PRINCIPLES GOVERNING INTENT AND CAUSATION TO HOLD THAT RACIALLY-MOTIVATED OPPOSITION TO SCHOOL SEGREGATION IN YONKERS COULD NOT LEGALLY INFORM PETITIONERS' FAILURE TO ENFORCE THEIR ANTI-SEGREGATION POLICIES	6
A. The district court properly interpreted the Equal Protection Clause to hold petitioners liable for their intentional failure to enforce anti-segregation policies because they capitulated to widespread opposition to desegregation	6

		Page
	B. Petitioners ignore the Second Circuit's conclusion that they took actions that had the effect of impeding desegregation efforts in Yonkers	11
POINT II:	NEW YORK EDUCATION OFFICIALS ARE REQUIRED TO ENSURE THAT SCHOOL DISTRICTS COMPLY WITH THE LAW AND ACT TO COMBAT SCHOOL SEGREGATION	11
POINT III:	THE SECOND CIRCUIT'S IMPOSITION OF LIABILITY ON PETITIONERS DID NOT VIOLATE PRINCIPLES OF FEDERALISM OR COMITY.....	14
CONCLUSION.....		15

TABLE OF AUTHORITIES

Cases:	**Page**
Buchanan v. Warley, 245 U.S. 60 (1917)	8
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)	8
Columbus Board of Education v. Penick, 443 U.S. 449 (1979)	5, 9, 12
Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981)	9
Estelle v. Gamble, 429 U.S. 285 (1976)	9
Lucas v. Colorado General Assembly, 377 U.S. 713 (1964)	8
Palmer v. Thompson, 403 U.S. 217 (1971)	7
Palmore v. Sidoti, 466 U.S. 429 (1984)	5, 7, 8
Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (1928)	12
United States v. Yonkers Board of Education, 624 F.Supp. 1276, *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied* 486 U.S. 1055 (1988)	*passim*
Vetere v. Allen, 15 N.Y.2d 259, 206 N.E. 174, *cert. denied* 382 U.S. 825 (1965)	13
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	5
Watson v. Memphis, 373 U.S. 526 (1963)	8
Wright v. Georgia, 373 U.S. 284 (1963)	8
United States Constitution:	
Equal Protection Clause of the Fourteenth Amendment	*passim*

	Page
Federal statutes:	
42 U.S.C. sec. 1983	*passim*
State statutes:	
N.Y. Education Law sec. 101	13
N.Y. Education Law sec. 305(1)	13
N.Y. Education Law sec. 308	13
Supreme Court rules:	
Rule 10	6

No. 96-1628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; LOUISE P. MATTEONI; JORGE L. BATISTA; EDWARD J. MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN; SAUL B. COHEN; JAMES C. DAWSON; ROBERT M. BENNET; ROBERT M. JOHNSON; PETER M. PREYOR; ANTHONY S. BOTTAR; MERRYL H. TISCH; HAROLD O. LEVY; and ENA L. FARLEY, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; and CHARLES GARGANO, as Director of the Urban Development Corporation,

Petitioners,

vs.

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, minor by her mother, and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly-situated and the CITY OF YONKERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

YONKERS BRANCH NAACP'S OPPOSITION TO STATE OF NEW YORK'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Respondents' statement of facts

The petition for a writ of certiorari significantly understates the district court and Second Circuit's findings respecting how and why petitioners failed to combat school segregation in Yonkers in violation of the Equal Protection Clause. These facts establish that the Second Circuit faithfully applied this Court's Equal Protection precedents by holding petitioners liable under 42 U.S.C. sec. 1983.

Following a six-week trial during which the district court received thousands of exhibits and heard testimony from more than 30 witnesses, it reached the following factual conclusions upon which the Court of Appeals relied to impose section 1983 liability against petitioners.

1. Petitioners knew or should have known that the segregation in Yonkers was *de jure* and that Yonkers would not take the steps necessary to end it. Pet.App. 9a-10a. The district court "found that the State defendants were aware of circumstances that should have alerted them to the likelihood that Yonkers had a substantial problem of unlawful segregation in its schools and that if the State defendants were not so alerted, it was because they themselves chose to remain ignorant in the face of actual conflicting evidence." Pet.App. 9a.

2. "[T]he State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation. If the State did not in fact force

compliance, it is not because it lacked the authority or practical power to do so." Pet.App. 11a (quoting district court opinion). Indeed, the State Education Department is among the most activist state educational bodies in the country as it "vigorously monitor[s] and regulat[es] many different aspects of education." Pet.App. 10a (quoting district court opinion).

3. "The State did not, in short, require anything of Yonkers in the area of school desegregation. While proclaiming a willingness to help Yonkers if Yonkers were to choose to desegregate voluntarily, the State decided that it would not force Yonkers to change." Pet.App. 12a (quoting district court opinion) (internal quotations omitted).

4. "In addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation. . . .[T]he court found, *inter alia*, that the Board of Regents itself took actions that were, and were recognized to be, designed to cut back on school desegregation." Pet.App. 12a-13a. Specifically, individual Regents urged the State Education Commissioner not to resolve citizen segregation petitions by entering drastic desegregation orders. The Regents sought to reign in the Commissioner, Ewald Nyquist, a desegregation proponent, and, in 1976, fired him substantially because of his views on integration. Petitioners also revised their policy statement on segregation to dilute its pro-segregation force. Pet.App. 13a. Following the judicial invalidation of a statute that prohibited State and local education officials from assigning students to achieve racial balance or taking other desegregative actions, *"the State took measures that had the cumulative effect of undermining efforts to reduce school segregation.*" Pet.App. 14a (emphasis in original) (quoting district court opinion).

5. Critically, "[t]he reasons for the State defendants' actions and inactions, the district court found, were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based." Pet.App. 13a. "The district court found that the determined reluctance on the

part of the State to enforce its own desegregation policy in Yonkers resulted chiefly from the fact that race-based political opposition to integration throughout New York State eventually exerted enough pressure on the Regents and on SED officials as to cause them to become cautious and reactive on the issue of desegregation. These pressures can only be explained in racial terms." Pet.App. 14a-15a (quoting district court opinion). In summary, the Court of Appeals affirmed the district court's finding that

> the State had the power to act in support of school desegregation in Yonkers, but it lost the will to act. And it lost the will to act for the simple reason that its once touted principles of racial equality in the schools had become politically untenable. Pet.App. 15a (quoting district court opinion).

See also, Pet.App. 37a-38a ("[T]here was ample support, and the State defendants do not appear to contend otherwise, for the court's finding that the failure of the SED officials to take action toward desegregation in Yonkers, though they took remedial action in other cities, was the result of heavy pressure from the New York State Legislature"); Pet.App. 41a ("The court permissibly found that the State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated").[1]

6. "The district court found that the State's acts and omissions impacted the City in several ways. The most obvious way was that Yonkers was not forced to desegregate its schools. There is every reason to believe that had the State

---

[1] Petitioners erroneously state that the Court of Appeals concluded that their actions and omissions "were undertaken in response to legislative pressures they knew to be racially motivated." Pet. 8 (citing Court of Appeals opinion at Pet.App. 44a). In fact, the Court of Appeals made clear that petitioners had deferred "to the racially inspired positions of the local officials *and* the known anti-desegregation stance of other state officials." Pet.App. 44a (emphasis added).

brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions." Pet.App. 15a (quoting district court opinion). The State officials and the Board of Regents made no serious effort to dispel the public perception, of which they were aware, that the State would not force Yonkers to desegregate. Thus it occurred in Yonkers, where local support for desegregation was minimal and no citizen-initiated . . . proceeding was ever commenced, desegregation simply did not take place until it was compelled by order of the federal court." Pet.App. 17a (quoting district court opinion).

B. The Court of Appeals' opinion

In reversing the district court's holding that petitioners were not liable under the Equal Protection Clause for school segregation in Yonkers, the Court of Appeals largely adopted the district court's findings of fact. Pet.App. 9a-17a. However, the Court of Appeals applied its own, as well as this Court's, precedents to hold that petitioners had violated the Equal Protection Clause. Pet.App. 26a-44a. Specifically, the court applied *United States v. Yonkers Board of Education*, 624 F.Supp. 1276, *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied* 486 U.S. 1055 (1988) ("*Yonkers III*") which, in turn, cited *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and *Palmore v. Sidoti*, 466 U.S. 429 (1984) to hold, *inter alia*, that "the forbidden segregative intent was established where governmental defendants took actions in response to and in accordance with community pressures that they knew were racially motivated." Pet.App. 28a (citing *Yonkers III*, 837 F.2d at 1224).

The Second Circuit also held that the Equal Educational Opportunities Act ("EEOA") abrogates the State's Eleventh Amendment immunity (Pet.App. 46a) and respondents were entitled to prevail against petitioners under that statute. Id. at 45a. As section 1983 provides an independent basis for liability against petitioners even without the Second Circuit's

EEOA rulings, we do not address their arguments in support of certiorari respecting that statute.

REASONS FOR DENYING PETITION FOR CERTIORARI

This Court will only grant a petition for certiorari for compelling reasons, including a conflict with a decision of another circuit or to review an opinion that "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure from a lower court, as to call for an exercise of this Court's supervisor power." Supreme Court Rule 10.

Since the portion of the Second Circuit's opinion imposing section 1983 liability against petitioners (1) faithfully applies this Court's Equal Protection jurisprudence and neither departs from nor violates traditional causation principles and (2) petitioners do not identify any conflict with circuit precedent, there is no compelling reason to grant certiorari and this Court should decline to do so.

POINT I

THE COURT OF APPEALS FAITHFULLY APPLIED SUPREME COURT AUTHORITY AND PRINCIPLES GOVERNING INTENT AND CAUSATION TO HOLD THAT RACIALLY-MOTIVATED OPPOSITION TO SCHOOL SEGREGATION IN YONKERS COULD NOT LEGALLY INFORM PETITIONERS' FAILURE TO ENFORCE THEIR ANTI-SEGREGATION POLICIES

A. The district court properly interpreted the Equal Protection Clause to hold petitioners liable for their intentional failure to enforce anti-segregation policies because they capitulated to widespread opposition to desegregation

While acknowledging that the Second Circuit affirmed the district court's factual conclusion that their failure to properly remedy school segregation in Yonkers represented a

capitulation to racially-motivated hostility to segregation (pet. at 9), petitioners argue that this Court should grant the writ because the Circuit Court stood "reality on its head" by holding that they caused the constitutional violations. Pet. at 17. However, certiorari is unnecessary because the Second Circuit's decision is faithful to this Court's precedents governing Equal Protection, intent and causation.

As an initial matter, contrary to petitioners' assertions, the Second Circuit did not impose liability based solely on the basis of their failure to remedy school segregation in Yonkers; the court also concluded, "[I]n addition to refusing to act to end segregation in Yonkers, *the State took certain actions that had the effect of encouraging that segregation.*" Pet.App. 12a (emphasis added). *See also*, Pet.App. 13a ("The reasons for the State defendant's *actions* and inactions, the district court found, were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based"). (Emphasis supplied).

In any event, the Equal Protection Clause contemplates that State officials cannot refuse to enforce their desegregation policies because of racially-motivated community and State opposition. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), this Court held that the effects of racial prejudice cannot justify a classification designed to remove an infant from the custody of its natural mother. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.'" *Id.* at 433 (*citing Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)). While the Second Circuit cited *Palmore* as a basis to find liability throughout this litigation, including *Yonkers III*, petitioners fail to distinguish or even address it. Pet.App. 28a-29a.

Palmore is not the only Supreme Court precedent that the Second Circuit relied upon in concluding that racially-motivated inaction may predicate section 1983 liability. In *Buchanan v. Warley*, 245 U.S. 60 (1917), this Court invalidated a law motivated by an express desire to promote the public peace by preventing race riots, which forbade African-Americans from buying homes in white neighborhoods. *Palmore*, 466 U.S. at 433. *See also*, *id.* at 434, fn.3 (*citing*, *Watson v. Memphis*, 373 U.S. 526 (1963) (city officials could not proceed slowly to desegregate parks in order to "prevent interracial disturbances, violence, riots, and community confusion and turmoil") and *Wright v. Georgia*, 373 U.S. 284 (1963) ("the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present").

In addition, *Yonkers III*, on which the Court of Appeals relies,[2] cited *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964) and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). *Yonkers III*, 837 F.2d at 1224. In *Lucas*, this Court invalidated a discriminatory legislative reapportionment plan that the electorate had approved. This Court reasoned, "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be." 377 U.S. at 736-37. *Cleburne* employed similar reasoning to strike down a city requirement that a permit be obtained for the use of a dwelling as a home for mentally retarded persons where no such permit was required for similar types of uses for other dwellings. "The city may not avoid the strictures of the [Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." 473 U.S. at 448 (citing *Palmore*, *supra*). As *Yonkers III* noted,

---

[2] *Yonkers III* articulated the principle that petitioners wish this Court to review. In *Yonkers III*, the Second Circuit held, *inter alia*, that municipal officials illegally capitulated to their constituents' racial animus when making subsidized housing decisions that adversely affected minorities. 837 F.2d at 1222-26.

"The circuit courts have applied these principles in the context of challenges to segregation in both schools and housing, ruling that discriminatory action is not lawful simply because it was taken in response to the racially motivated opposition of a segment of the community." 837 F.2d at 1224-25.

Petitioners cannot articulate a constitutionally-meaningful distinction between affirmative State action intended to create and perpetuate segregation and a conscious failure, motivated by constituent and governmental opposition to desegregation, to pursue the steps necessary to end it. Inaction has the same effect as illegal action where State actors can and do reasonably foresee that their failure to proceed will cause segregated conditions. Recognizing that principle, *Columbus Board of Education*, *supra*, 443 U.S. at 464-65, a school desegregation case, stated:

> actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. These cases do not forbid the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be drawn. *Adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in considering whether an inference of segregative intent should be drawn.* (Emphasis added).

Moreover, concluding that "[l]iability may be premised not only on action but on a refusal to act," the Second Circuit cited *Doe v. New York City Department of Social Services*, 649 F.2d 134, 141 (2d Cir. 1981), which, in turn, invoked *Estelle v. Gamble*, 429 U.S. 285 (1976). Pet.App. 30a-31a. In *Estelle*, an Eighth Amendment case, this Court stated, "in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."

Accordingly, contrary to petitioners' assertions, this case is not about the imposition of section 1983 liability because the Second Circuit applied a "hindsight view that the state officials not only could, but should, have done more in Yonkers." Pet. at 14. Also, the Second Circuit did not apply an "if not part of the solution, then part of the problem" causation theory. *Id. See also*, Pet. at 19 ("The Second Circuit's imposition of liability, in the absence of the heretofore requisite element of intent, is cause for this Court's review"). This critique ignores an important factual conclusion supported by the evidence and affirmed by the Second Circuit: petitioners capitulated to community and statewide opposition to desegregation by intentionally failing to use their uncontroverted authority to eradicate school segregation in Yonkers.

Petitioners cannot now challenge as factually erroneous the district court's conclusion that they failed to end segregation in Yonkers in response to racially-motivated pressures by government officials and the community (the same theory of liability predicating the district court's 1985 liability ruling which the Second Circuit affirmed in *Yonkers III*). Indeed, the Second Circuit liberally cites the district court's factual conclusions. *See*, *e.g.*, Pet.App. 13a ("The reasons for the State defendants' actions and inactions, the district court found, were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based"); *id.* at 14a-15a ("The district court found that the determined reluctance on the part of the State to enforce its own desegregation policy in Yonkers resulted chiefly from the fact that race-based political opposition to integration throughout New York State eventually exerted enough pressure on the Regents and on SED officials as to cause them to become cautious and reactive on the issue of desegregation. *These pressures can only be explained in racial terms*") (citations omitted) (emphasis supplied).

As the Second Circuit concluded, petitioners would have employed its powerful remedial resources to enforce its anti-segregation policies but for its purposeful desire not to buck

the anti-desegregation mentality that it knew had surfaced locally and statewide. The Circuit held, "[t]here is every reason to believe that had the State brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions." Pet.App. 15a (quoting district court opinion). *See also*, Pet.App. 12a ("While proclaiming a willingness to help Yonkers if Yonkers were to choose to desegregate voluntarily, *the State decided that 'it would not force Yonkers to change'*" (citing district court) (emphasis supplied). In short, consistent with this Court's Equal Protection Clause jurisprudence, the Second Circuit properly found petitioners liable because segregation in Yonkers was "*maintained* by intentional state action," that is, petitioners' racially-motivated refusal to wield its broad authority to end school segregation in Yonkers. *Columbus Board of Education*, 443 U.S. at 464 (citations omitted) (emphasis supplied).

B. Petitioners ignore the Second Circuit's conclusion that they took actions that had the effect of impeding desegregation efforts in Yonkers

The gravamen of the certiorari petition is that the Second Circuit improperly imposed section 1983 liability against petitioners by concluding that the intentional refusal to enforce anti-discrimination policies may violate the Equal Protection Clause. *See, e.g.*, Pet. at 19. However, petitioners completely ignore the Second Circuit's conclusion that they are liable for maintaining school segregation in Yonkers by committing acts that effectively preserved the *status quo*. *See*, Pet.App. 12a ("In addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation").

Specifically, the Second Circuit noted that, while petitioners did not affirmatively act to impede desegregation efforts in Yonkers or indicate that they approved of it or would "look the other way" should Yonkers maintain its segregative practices, "the Board of Regents itself took actions that were, and were recognized to be, designed to cut back on school

desegregation." Pet.App. 12a-13a. When desegregation petitions were pending before New York's pro-desegregation Education Commissioner, Ewald Nyquist, the Regents urged him not to enter strong desegregation orders. *Id.* at 13a. Also, the Regents "sought to reign in Nyquist's desegregation efforts" and "revised their policy statement on segregation so as to dilute[ ] [its] pro-desegregation force." *Id.* (quoting district court opinion) (modifications in original). In November 1976, the Regents fired Nyquist, substantially because of his views on integration. Pet.App. 13a, 14a. Like their refusal to enforce the State's anti-segregation policy, the Court of Appeals concluded that petitioners took actions that effectively encouraged segregation in "respon[se] to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based." Ja13a. *See also,* Pet.App. 14a-15a.

Petitioners' actions that effectively encouraged segregation in Yonkers were far from the passive decisions and inaction that they claim informed the imposition of section 1983 liability. Like their intentional failure to enforce the State's anti-segregation policies, these actions had the foreseeable effect of encouraging and maintaining segregation in violation of the Equal Protection Clause. Not only is the foreseeable effect of an intentional act sufficient to impose liability under traditional tort principles, *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), this Court has stated that it may establish discriminatory intent in the school segregation context. *See, Columbus Board of Education, supra,* 443 U.S. at 464-65 ("actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. . . . *Adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in considering whether an inference of segregative intent should be drawn")* (emphasis added).

Since the Second Circuit properly applied traditional tort principles and *Columbus Board of Education* to impose

liability on petitioners for taking actions that effectively maintained school segregation in Yonkers, certiorari is improper.

POINT II

NEW YORK EDUCATION OFFICIALS ARE REQUIRED TO ENSURE THAT SCHOOL DISTRICTS COMPLY WITH THE LAW AND ACT TO COMBAT SCHOOL SEGREGATION

Petitioners argue that the Second Circuit improperly imposed section 1983 liability against them despite their inability to micro-manage school districts. Pet. at 15-16. However, as the Second Circuit properly concluded that petitioners are required to ensure that school districts comply with State policy and Federal law, certiorari is improper.

As the Second Circuit noted, New York Education Law contains numerous provisions requiring petitioners to exercise meaningful oversight over every school district and, *inter alia*, "enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents." Education Law sec. 305 (1) (McKinney's 1988). Petitioners acknowledge that "the State's role is to regulate, monitor and advise" the districts. Pet. at 15-16. They "are charged with the general management and supervision of all public schools" (Education Law sec. 101) and the Education Commissioner "shall also have the power and it shall be his duty to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any party thereof or to any school district." Education Law sec. 308. *See generally*, Pet.App. 42-43a (Court of Appeals reviewed applicable New York statutes governing education and petitioners' powers and broad duties to intervene where "racial imbalance in the schools of a given community has made the schools educationally inadequate") (*citing Vetere v. Allen*, 15 N.Y.2d 259, 267, 206 N.E. 174, *cert. denied* 382 U.S. 825 (1965)).

As *de jure* school segregation is precisely the kind of educational problem that required petitioners to actively enforce their anti-segregation policies, their argument that the Second Circuit improperly expanded their responsibilities under the Education Law merits no basis for certiorari.

POINT III

THE SECOND CIRCUIT'S IMPOSITION OF LIABILITY ON PETITIONERS DID NOT VIOLATE PRINCIPLES OF FEDERALISM OR COMITY

While petitioners pray for certiorari because the Second Circuit violated principles of federalism and comity by imposing section 1983 liability against them, their analysis conspicuously ignores a critical fact: they capitulated to racially-motivated opposition to desegregation by maintaining school segregation in Yonkers. *Compare*, Pet. at 20 (the Second Circuit opinion "has the untenable result of subjecting state officials to constitutional liability whenever, in the view of the federal courts, they fail to act quickly or thoroughly enough in response to unlawful municipal actions of which that States are held to have knowledge and the authority to correct") *with* Second Circuit opinion at Pet.App. 41a ("The [district] court permissibly found that the State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated") (*citing Yonkers III*, 837 F.2d at 1224-26, 1232).

While State governments have latitude to manage their internal affairs, they are not exempt from requirements imposed by the Equal Protection Clause and section 1983. On the basis of the district court's factual findings which the Second Circuit adopted to impose section 1983 liability against petitioners, the issue is not whether that court could intervene in matters about which reasonable people could disagree. As there is nothing reasonable about intentional school segregation or petitioners' intentional acts and omissions which maintained an illegal *status quo*, granting certiorari on the

ground that the Second Circuit has intruded on legitimate State prerogatives would be improvident.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April 29, 1997
Goshen, New York

Respectfully submitted,

MICHAEL H. SUSSMAN
STEPHEN BERGSTEIN

SUSSMAN, BERGSTEIN
& WOTORSON
25 Main Street
Goshen, New York 10924
(914) 294-3991

Attorneys for Respondent,
Yonkers Branch, National Association
for the Advancement of Colored People